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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 482

LOCAL NO. 207, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, ET AL., *Petitioners*.

v.

JACOB PERKO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

NO. 541

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES, *Petitioner*

v.

H. N. BORDEN

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief as *amicus curiae* in support of the petitioners in No. 482 and No. 541, as provided for

in Rule 42 of the Rules of this Court. The consent of the attorneys for the petitioners in both cases has been obtained. The consent of the attorneys for the respondents in both cases was requested but refused.

The AFL-CIO, a federation of national and international unions having approximately thirteen million members, is the principal spokesman for organized working people in this country. Among its affiliates are the two international unions to which the local union petitioners in No. 482 and No. 541 belong. The Federation regards the positions of the petitioners in both cases as plainly right under well-accepted and controlling decisions of this Court. Ordinarily we would feel there was no need for an *amicus* presentation in such a situation. In this instance, however, we wish to suggest to the Court that it reexamine certain prior precedent and base its reversals of the judgments below on a more comprehensive and realistic rationale than may be possible while that precedent still stands.

The union petitioners will of course emphasize that their cases can easily be disposed of in accordance with existing authority. While petitioners are correct, nevertheless in our view this Court can contribute greatly to the vitality of national labor policy by taking a broader approach. Instead of relying on the distinction between *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, which covers both of the present cases, and *Machinists* v. *Gonzales*, 356 U.S. 617, which is totally inapposite here, the Court should eliminate the need to distinguish, by repudiating *Gonzales*. As we propose to show, *Gonzales* has served to confuse most of the lower courts and to encourage some of them to subvert basic federal objectives by regulating labor-management relations under the guise, for example, of redressing wrongs done union members within their organizations. *Gonzales* is at odds with the main-

stream of current preemption theory and with the practical requirements of uniform national labor policy. We feel that an *amicus* presentation by the AFL-CIO will assist the Court in assessing the need to reevaluate *Gonzales* and in fashioning a more adequate formulation of the preemption rule.

Respectfully submitted,

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March 1963

IN THE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

INTEREST OF THE AFL-CIO

This brief *amicus curiae* is tendered for filing by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's

granting the Motion for Leave to File a Brief as Amicus Curiae.

The AFL-CIO is primarily a federation of national and international unions which have a total membership of approximately thirteen million. The AFL-CIO regards the two state court decisions being reviewed in No. 482 and No. 541 as plainly wrong under existing precedents of this Court, and ordinarily in such a situation the Federation would consider an *amicus* brief by it superfluous. In the present instance, however, we wish to urge the Court to use this opportunity to reexamine certain prior precedent, to repudiate it, and to ground its reversals of the judgments below on a broader and more realistic basis than may be possible while that precedent remains as authority.

The union petitioners will naturally concentrate on the facts and law of their particular cases. But the two cases before the Court are not important merely because they represent an erroneous interpretation by state courts of this Court's leading decisions on the perennial themes of federal preemption and the exclusive primary jurisdiction of the National Labor Relations Board. The instant cases are also important because they are symptoms of a marked deformity in the law of preemption itself. *Machinists* v. *Gonzales*, 356 U.S. 617,[a] simply does not fit with what preceded it and what followed it. It has proven, in actual practice, to be a source of confusion to state courts over the proper limits of their authority, a ready instrument whereby artful pleaders can circumvent the exclusive juris-

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[a] In singling out *Gonzales* for criticism, we do not mean to indicate approval of the holding in its companion case, *Automobile Workers* v. *Russell*, 356 U.S. 634. To the extent that state court *jurisdiction* in *Russell* is now attributable to the presence of "violence and imminent threats to the public order," see *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247, the decision

diction of the federal Board through a slight shift in the wording of their prayers for state court relief, and an open invitation to hostile or unknowing judges and juries to regulate labor-management relations under the guise, for example, of redressing wrongs done union members within their organizations. As the principal spokesman for organized working people, the AFL-CIO therefore has a direct interest not only in securing reversals in the present cases, but also in rooting out an underlying cause of the errors.

ARGUMENT

I. Under This Court's Applicable Decisions, Courts Have No Jurisdiction Over Actions By Employees For Loss Of Employment Resulting From Nonviolent Conduct Arguably Subject To The National Labor Relations Act.

Petitioners in *Iron Workers Local 207* v. *Perko*, No. 482, and *Plumbers Local 100* v. *Borden*, No. 541, have thoroughly demonstrated that the judgments below in both cases should be reversed because they are in conflict with the applicable decisions of this Court. We do not wish to burden the Court with a repetition of petitioners' arguments. But since we intend to devote the major portion of this *amicus* presentation to suggesting that the reversals should be placed on broader grounds than existing precedent may allow, and that these cases should be used as vehicles for reexamining *Machinists* v. *Gonzales*, 356 U.S.

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may be supportable. To the extent that *Russell* upheld an award for lost wages and punitive damages to an employee kept from work by a strike and picketing, the decision is subject to much the same objections as *Gonzales*. We focus on the latter because it is more expansive in theory and more troublesome in practice. But our comments will often apply to both.

617, as well as certain aspects of *Automobile Workers* v. *Russell*, 356 U.S. 634, we should first like to make it clear that we are advocating this course because we think it highly desirable, not because we think it necessary in order to sustain petitioners' positions in the instant cases.

In *Perko* the union allegedly forced respondent's employer to discharge him, and kept respondent from securing further employment, because he had violated a union rule against imparting the skills of his craft to the members of another union (R. 2, 183).[3] In *Borden* respondent transferred from one local to a sister local, and the latter then allegedly refused to refer him to a job through its hiring hall (R. 11-13, 23-24, 349-350). In each case the union contested the jurisdiction of the state court on the ground the subject matter of the action was within the exclusive jurisdiction of the National Labor Relations Board (R.[*Perko*] 9, 12; R.[*Borden*] 6, 25, 350).

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[3] The union may have prevented the respondent from being employed in a supevisory status, so that he would not have been entitled to the protections afforded an "employee" by the federal Act. We agree with petitioners that the classification of respondent as an employee or as a supervisor should be a matter for the Labor Board in the first instance. But even if respondent is considered a supervisor, this would merely transform the union's arguable unfair labor practice from an 8(b)(2) (causing employer discrimination against employees to encourage union membership) into an 8(b)(1)(B) (coercing employers in the selection of their bargaining representatives), see *NLRB* v. *Teamsters Local 294*, 284 F. 2d 893 (2d Cir. 1960); *cf. Typographical Union* v. *NLRB*, 278 F. 2d 6 (1st Cir. 1960), *aff'd. by equally divided Court*, 365 U.S. 705, or an 8(b)(1)(A) (coercing employees in the rights guaranteed them under sec. 7), *cf. NLRB* v. *Better Monkey Grip Co.*, 243 F. 2d 836 (5th Cir. 1957), *cert. den.* 355 U.S. 864 (employer coerced non-supervisory employees by discharging supervisor for testifying under the Act). In either event Board jurisdiction would be exclusive.

We start with the proposition that "[w]hen an activity is arguably subject to §7 or §8" of the National Labor Relations Act, the courts "must defer to the exclusive competence" of the NLRB. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245. See also *Garner* v. *Teamsters Local 776*, 346 U.S. 485; *Weber* v. *Anheuser-Busch*, 348 U.S. 468. Job discrimination to encourage unionism by compelling adherence to a union's institutional rules is at least arguably an unfair labor practice under section 8 of the Act, as is union-inspired discrimination in the referral of job applicants from an exclusive hiring hall. *Radio Officers' Union* v. *NLRB*, 347 U.S. 17; *cf. Carpenters Local 60* v. *NLRB*, 365 U.S. 651; *Teamsters Local 357* v. *NLRB*, 365 U.S. 667. Absent some special factor, therefore, the courts are obviously ousted of jurisdiction to entertain actions like those involved here.

Preemption admits of two exceptions. Despite the presence of activities potentially subject to the NLRA, states retain the power to regulate as a matter of their own state law[3] (1) conduct of "merely peripheral concern" to the federal Act, and (2) conduct "marked by violence and imminent threats to the public order." *Garmon*, 359 U.S. at 243-44, 247, citing *Gonzales* for the first exception and

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[3] In addition, the doctrine of primary jurisdiction does not apply to prevent a state court from assuming jurisdiction over a suit under sec. 301 of the Taft-Hartley Act on a contract between an employer and a union, even though an unfair labor practice is also involved; however, the law to be applied in such a case is not state law but federal law. *Smith* v. *Evening News Assn.*, 371 U.S. 195; see also *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502; *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95; *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238. This line of decisions gives respondents no comfort. The suits here are between individuals and labor organizations, and are grounded on state substantive law, not on any collective bargaining agreement.

Russell and *Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, for the second. No one suggests that violence is any part of either of the instant cases. Nor is the *Gonzales* exception applicable.

In *Gonzales* the "crux of the claim," as revealed by the pleadings, was an individual's expulsion from a labor organization in alleged violation of his contract of membership. 356 U.S. at 618. This wrong would have been totally beyond the jurisdiction and remedial powers of the NLRB, and the union did not contest the power of the state courts to order reinstatement. *Id.* at 619. In both cases presently before the Court, on the other hand, the crux of the claims was the loss of employment because of union discrimination or coercion. And that is of the very stuff of Board jurisdiction. In *Perko* the respondent made no claim whatsoever on the basis of lost membership rights (R. 9). In *Borden* the respondent did make an allegation that he was for a time denied transfer into one local from a sister local, but the jury found to the contrary (R. 2, 12, 63). So respondents can rely upon neither the "violence" exception nor the *Gonzales*[*] exception to the preemption doctrine in attempting to sustain the jurisdiction or remedial power of the state courts.

We leave it to petitioners to dispose of the various other subsidiary grounds which have been advanced for upholding state jurisdiction in these cases. Their flavor is suggested by the contention of the Texas Court of Civil

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[*] In *Gonzales*, furthermore, the union's pleadings "challenged the jurisdiction of the [state] court, but said nothing about unfair labor practices." 356 U.S. at 622, n.1. In contrast, the pleadings of petitioners here expressly pointed out the applicability of protections or prohibitions of the NLRA (R. [*Perko*] 12; [*Borden*] 6).

Appeals in *Borden* that there could have been no discrimination to encourage union membership in violation of sections 8(a)(3) and 8(b)(2) because "plaintiff was already a member" (R.351). That argument was laid to rest by this Court as long ago as *Radio Officers*, 347 U.S. 17.

II. Courts Should Not Have The Power To Supply A Remedy For Nonviolent Conduct Arguably Subject To The National Labor Relations Act, Regardless Of Their Jurisdiction Over The Basic Cause Of Action.

A. State Court Applications and Misapplications of Gonzales

As we have demonstrated, the decisions below are plainly wrong because they sustain state court jurisdiction over conduct arguably subject to the exclusive jurisdiction of the NLRB, in direct conflict with the *Garmon* holding. Each case is clearly distinguishable from the situation in *Gonzales* or *Russell*, where a state court assumed jurisdiction over conduct subject to state control and then, in the course of adjudicating the issues properly before it, supplied a remedy which reached conduct subject to the federal Act. Although the present cases can thus easily be disposed of on the narrow ground that they fall within the *Garmon* rather than the *Gonzales* pattern, in our view the Court should use this opportunity to reexamine the validity of the *Gonzales* distinction itself, and should base its decisions on a more comprehensive and realistic rationale than may be possible while the *Gonzales-Russell* precedents still stand.

The courts below in both of the pending cases cited *Gonzales* in support of their assertion of jurisdiction. This is customary whenever an individual seeks a judicial remedy against a labor organization for alleged interference with his job rights, regardless of the precise nature of his

cause of action. What proposition *Gonzales* may be cited for in any given opinion seems to be as much a function of geography as of legal analysis. We have, however, attempted to make some reasonable classification of a cross-section of the reported decisions.

Distressingly, but significantly, the largest number of opinions seem unable to articulate exactly what they think *Gonzales* means, especially in light of the subsequent *Garmon* decision; the natural tendency in such a situation is for a court to uphold its own jurisdiction. Another set of decisions applies *Gonzales* with literal correctness but incongruous results. The most thought-provoking approach is one which, while still ill-defined and at odds with existing precedent, indicates how *Gonzales* could logically be extended to undermine almost the entire doctrine of federal preemption and primary jurisdiction. Finally, and we hope prophetically, one line of cases suggests that *Gonzales* has effectively been overruled by *Garmon*. We shall deal in turn with each of these categories.

1. The courts of such states as Ohio, Oklahoma, North Carolina, Kansas and Idaho quite simply do not understand *Gonzales*. Essentially, they think it authorizes state court jurisdiction whenever a cause of action can be characterized as a tortious invasion of a property right, or a breach of contract, or can otherwise be tagged with a label derived from the common law, even though the alleged wrong is also an unfair labor practice. Thus, in *Perko*, the Supreme Court of Ohio cited *Gonzales* and *Russell* for the proposition: "The National Labor Relations Act does not give the National Labor Relations Board such exclusive jurisdiction over the subject matter of an action to recover damages for a common-law tort, which is also an unfair labor practice proscribed by the act, as to preclude an appropriate state court from exercising jurisdiction" (R. 9-

10). See also *Pierce* v. *Otis Elevator Co.*, 331 P. 2d 481 (Okla. 1958) ("blacklisting" of employee by union and employer); *Willard* v. *Huffman*, 250 No. Car. 396, 109 S.E. 2d 233 (1959), *cert. den.* 361 U.S. 893 (employee discharged for union activities); *Taylor* v. *Operating Engineers Local 101*, 189 Kan. 137, 368 P. 2d 8 (1962) (union interference with employee's contract of employment). Even where *Gonzales* might possibly have been correctly applied, as in *Lockridge* v. *Motor Coach Employees*, 369 P. 2d 1006, 1010 (Ida. 1962) (union member sued for damages resulting from allegedly wrongful suspension), a court may be able to do no better in rationalizing the controlling decisions than to say: "In view of the unsettled state of the federal law, our course is clear. We must assert jurisdiction in every doubtful case . . ."

2. The New York courts seem to have followed *Gonzales* with literal exactitude and in so doing have only succeeded in emphasizing its defects. In *Green* v. *Folks*, 13 App. Div. 2d 744, 215 N.Y.S. 2d 116 (1961), the court dismissed an employee's action against his employer and union to recover damages for an allegedly unlawful discharge stemming from an invalid suspension from the union. The employee then turned around and sued the union on a theory of wrongful suspension, seeking reinstatement to membership and consequential damages for loss of wages. Citing *Gonzales*, the court accepted jurisdiction over this more artfully pleaded second action. 223 N.Y.S. 2d 287 (N.Y. Cty. 1961). Yet the major change in the substance of the suit was the dropping of the employer as a defendant.

3. In upholding state jurisdiction in *Borden* below, the Texas Court of Civil Appeals relied on *Gonzales* to support the view that the federal Act "does not displace state court jurisdiction over suits to determine and enforce rights of union members in their union" (R. 351). As we have previ-

ously indicated,[5] this is not a fair construction of the pleadings in *Borden*. The pleadings here are still in no better posture than those in the first round of the New York litigation in *Green* v. *Folks*, just discussed; the crux of the action is the loss of job rights, not the loss of union membership rights. Yet it must be conceded there is a certain perverse logic in the implications of the Texas opinion. Unless *Gonzales* is rigorously limited to its precise facts,[6] why could not a union member sue his organization for breach of an "implied promise" of equal treatment in his contract of membership, and then recover consequential damages for discrimination in job referrals or other employment rights?[7] The realistic answer, of course, is that we cannot afford to jeopardize national labor policy by allowing state courts to immunize themselves from the preemption doctrine by the simple process of reading into union constitutions, as a matter of state contract law,[8] what-

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[5] See part I *supra*, p. 6.

[6] See note 4 *supra*. But suggesting that *Gonzales* might be followed as long as the talismanic words, "sec. 7," "sec. 8" or "unfair labor practice," do not appear in the union's answer, places entirely too high a premium, we feel, on skillful pleading. In addition, of course, *Gonzales* dealt with an expelled member's suit for reinstatement, not with a member's suit for enforcement of other intraunion rights. It may be difficult in theory, however, to make this a decisive distinction.

[7] Paragraph XIII of the original petition and paragraph XV of the first amended original petition in *Borden* contained allegations of just such breaches of an "implied promise" in the contract of membership (R. 4, 14). Respondent's pleading error was his failure to make these alleged breaches the "crux" of his action. Surely the vitality of uniform national labor policy cannot be allowed to hinge on these vagaries.

[8] The potential applicability of state substantive law is enough in itself to make the situation entirely different from cases of suits under sec. 301 of the Taft-Hartley Act, where federal law is ap-

ever "implied promises" happen to suit their purposes. *Gonzales* must be reexamined, and its implications, at least, repudiated.

4. Pennsylvania regards *Gonzales* as being effectively overruled by *Garmon*. See *Wax* v. *Mailers Union*, 400 Pa. 173, 161 A. 2d 603 (1960). That view may not be in accordance with the literal language of the *Garmon* opinion. But it is wholly justified by the practical necessity, as recognized by this Court in its decisions from *Garner* through *Garmon*, of strictly limiting the exercise of state jurisdiction in the field of labor relations in order to ensure the effectiveness of uniform national policy.

This mass of conflicting state court interpretations of *Gonzales* underscores the need to reevaluate the premises and implications of that decision, and to extirpate its potential for thwarting basic federal labor objectives.

B. The Fallacies of Gonzales

In *Gonzales* an individual sued a union for reinstatement on the ground he had been expelled in violation of his membership contract, and this Court upheld the power of a state court to include in the remedy an award of damages for lost wages and mental suffering resulting from the breach of contract. 356 U.S. at 620-21. Professor Michael Sovern of Columbia observes that three arguments were given to support this result, and concludes as to two that "neither of them will withstand analysis."* We agree with the

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plicable and this Court has the power of full review. See note 3 *supra* and note 12 *infra*.

*Sovern, "Section 301 and the Primary Jurisdiction of the NLRB," 76 Harv. L. Rev. 529, 555 (1963). Numerous other commentators, including some sympathetic to the result, have characterized *Gonzales* as being out of harmony with the general tenor of this Court's preemption decisions. See, *e.g.*, Meltzer, "The Supreme

quoted judgment. It was suggested in *Gonzales* that the "evidentiary coincidence" between the facts needed there to support a breach of contract and the facts needed in a "plausible proceeding" before the NLRB did not require displacement of state court jurisdiction, any more than did the "argumentative coincidence" of facts in the tort action in *Laburnum*. 356 U.S. at 621. That rationale, insofar as it likened *Gonzales* to a tort suit, was expunged by *Garmon;* state jurisdiction is preempted where the conduct is "arguably subject" to the NLRA. 359 U.S. at 245. It was further suggested in *Gonzales* that the award of damages presented no greater risk of conflict with the Board than the reinstatement to membership. 356 U.S. at 621. But as Sovern says: "This simply is not true. * * * the award of damages is based on the resolution of issues that are central to the NLRA." [10]

This leaves one remaining ground for *Gonzales*. Once having acquired jurisdiction over the reinstatement suit, it was reasoned, the state court should have the power to "fill out" the remedy by awarding damages for the consequential loss of wages and mental suffering; there was no need to "mutilate the comprehensive relief of equity" by requiring an employee to go to the courts for his lost membership and to the Labor Board for his lost wages. 356 U.S. at 621. That rationale, too, we submit, is demonstrably unsound. As a matter of legal theory, it is premised on a concept of preemption whose validity was assumed by a

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Court, Congress, and State Jurisdiction over Labor Relations," 59 Col. L. Rev. 6, 44 (1959); Schwartz, "The Supreme Court—October 1957 Term," 57 Mich. L. Rev. 315, 332 (1959); Hanslowe, "Labor Relations Law," 36 N.Y. Univ. L. Rev. 1446, 1448 (1961) ("[t]he distinction [between *Garmon* and *Gonzales* situations] is not always easily drawn and may, in this sort of case, depend more upon the semantics of pleading than upon substance").

[10] Sovern, *supra* note 9, 76 Harv. L. Rev. at 555-56, n. 80.

majority of the Court at the time of *Gonzales*, but which was ultimately rejected in *Garmon*. And as a matter of labor policy, it represents a balancing of the undesirability of fragmented remedies against the undesirability of overlapping or conflicting remedies, with the erroneous practical judgment being made that the latter was the lesser evil.

When *Gonzales* was decided the prevailing view of this Court was that the application of the preemption principle turned on the existence of a possible "conflict" of "remedies." *Laburnum*, 347 U.S. at 665; *Russell*, 356 U.S. at 644. Consequently, there was a certain appeal to the *Gonzales* argument that state court jurisdiction should be upheld where the Labor Board could not give the kind of relief or the full relief sought by a party. But with *Garmon* this concept evaporated. The experience of more than a decade of adjusting federal-state relations in this area had taught that the crucial factor in preemption was not the remedy but the conduct remedied, "the nature of the activities which the States have sought to regulate, rather than * * * the method of regulation adopted." 359 U.S. at 243. *Gonzales* could then properly be left to stand for the proposition that the states retain the power to regulate conduct which is "a merely peripheral concern of the Labor Management Relation Act." *Ibid.*

The fault lies in the *Gonzales* application, not the *Garmon* rationalization. Union membership rights as such are indeed of only peripheral concern to the scheme of the NLRA; but concern with job discrimination aimed at encouraging or discouraging unionism is at the Act's very core. When the state court reinstated *Gonzales* to union membership it was, we will assume, validly enforcing a contract in accordance with state law. When it proceeded to award damages for lost job rights, however, it was invading a federal domain by regulating labor relations,

again in accordance with state law. To characterize what took place in any other fashion is to engage, as the Chief Justice remarked in dissenting in *Gonzales*, in "a game that is played with labels." 356 U.S. at 632.

Gonzales likewise finds no support in the decisions of this Court which have sustained the concurrent jurisdiction of the federal and state courts to entertain suits on collective bargaining agreements, despite the possible involvement of unfair labor practices.[11] *Gonzales* was a contract action, but the contract was between an organization and a member, to be interpreted and enforced, we gather, under state law,[12] not a contract between a union and an employer, to be interpreted and enforced under a section of the same comprehensive federal law which delineates unfair labor practices and prescribes remedies for them. Within the one federal scheme possible conflicts between decisions of the Labor Board and the courts are always subject to ultimate resolution by this Court. But once it is established that in a certain type of case the states may exercise jurisdiction and provide remedies as a matter of state law, there is little this Court can thereafter do to preserve national labor

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[11] See note 3 *supra*.

[12] In *Gonzales* this Court apparently accepted the traditional view in this country that a union constitution and bylaws are a contract between union and member, enforceable as a matter of state law. 356 U. S. at 618-19. In *Parks* v. *IBEW*, 52 LRRM 2281, 46 Lab. Cas. ¶ 18,073 (4th Cir. Jan. 23, 1963), it was held that a local union could sue its international for alleged violation of the international constitution under sec. 301, on the ground the constitution was a contract "between • • • labor organizations." Even if this is correct, it would seem a long additional jump to sustain 301 jurisdiction when an individual member sues his union, and an impossible leap when the basis of the action is the *local* constitution or bylaws.

doctrines against erosion by the shifting currents of state decisions.

That brings us to the basic policy question in *Gonzales*. Which should be given paramountcy: the employee's desire to avoid having to pursue his remedies before two tribunals (put differently, a state's interest in providing an "unmutilated" equitable remedy), or the nation's interest in promoting a uniform system of labor regulation? The question should not be answered in the abstract, as is so often attempted. Former Professor Paul R. Hays of Columbia has wisely cautioned, for example, that too much theoretical analysis could result in underestimating "the possibilities of the severe impact on labor-management relations of the decisions in the *Russell* case and, even more importantly, the *Gonzales* case." [13]

In the real world, then, the inconvenience which would be caused an employee if *Gonzales* were overruled is nowhere near as bad as it may sound when one says he would be forced to "pursue his remedies before two tribunals." So far as the federal remedy is concerned, it means he would have to walk around to the nearest NLRB regional office, or mail the office a letter, and submit his charges. From then on Board agents would take over the pursuing of his remedy. On the other hand, if the *Gonzales-Russell* doctrine is sustained and extended in accordance with its logical implications, a labor organization may be faced with a suit which is technically for breach of a membership contract, but which carries with it the very genuine possibility that the remedy provided by the state court will include an award for back pay, for punitive damages or mental suffer-

[13] Hays, "Foreword," 59 Col. L. Rev. 1, 5 (1959).

ing in an amount some twenty times the back pay,[14] and for the "foreseeable" loss of the complaining employee's earnings during the entire remainder of his life expectancy.[15] If some two or three dozen employees are involved—and intraunion litigation is likely to involve a group of disaffected members—an award in which all sorts of subsidiary damages are added to the actual loss of wages can easily mount to a total in excess of a million dollars.[16] For a local labor union that can mean obliteration.

As long as the officially declared policy of the United States includes "encouraging the practice and procedure of collective bargaining" through "representatives of [the employees'] own choosing,"[17] the awarding of such staggering sums by state courts as a remedy for conduct subject to the NLRA represents a veritable displacement of national labor policy, with the form of the action serving only as a shabby cloak over the reality underneath. Set against such a displacement of federal policy, any minor inconvenience caused an employee who may have to file charges with the NLRB as well as a suit in the courts, and any theoretical "mutilation" of a court's comprehensive equity remedy, are as nothing in the balance. We question, indeed,

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[14] See *Russell*, 356 U.S. at 652, n. 10 (judgment upheld for $10,000, of which only $500 represented lost wages); see also the listing of companion actions, *id.* at 657, n. 16.

[15] See, *e.g.*, *Casida* v. *Operating Engineers*, Civil No. 10884, D. Tex., discussed in Brandwen, "Punitive-Exemplary Damages in Labor Relations Litigation," 29 Univ. Chi. L. Rev. 460, 461, n. 8 (1962), and accompanying text.

[16] *Ibid.* In *Casida* a Texas judge and jury awarded twenty-eight employees who lost their jobs during a strike $1,265,896. See also *Russell*, 356 U.S. at 656-58 (Russell was one of thirty fellow employees who filed claims totaling $1,500,000 in the Alabama courts).

[17] NLRA §1, 49 Stat. 449, §1 (1935), as amended by 61 Stat. 136 (1947), 29 U.S.C. §151.

whether many employees concentrate on the court route because they find any real inconvenience in having to pursue their remedies before two tribunals; we suggest that the usual reason for avoiding the Labor Board, when it would have jurisdiction and could order job reinstatement and award back pay, is the simple desire to get a labor union before a judge and jury imbued with hostile regional attitudes and armed with such antiquated but formidable truncheons as the power to award "smart" money.

Viewed either theoretically or practically, therefore, the kind of award upheld in *Gonzales*, or in *Russell*, is plainly incompatible with federal labor policy and with the main body of current preemption doctrine. The formulation of a more adequate rule to cover such situations as *Gonzales* and *Russell* is in order.

C. The Proper Preemption Rule

We need not quarrel with the *Garmon* proposition that the states retain jurisdiction to deal with "violence" or with conduct of a "merely peripheral concern" to the LMRA. Nonetheless, these are the exceptions; the general rule enunciated in *Garmon* is that the courts are ousted of jurisdiction over conduct "arguably subject" to the jurisdiction of the NLRB. From *Garner* through *Garmon* the mainstream of preemption theory reflects the same underlying reason for exclusive jurisdiction—which is also the key to the solution here: "Administration is more than a means of regulation; administration is regulation. • • • To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Garmon*, 359 U.S. at 243, 244; see also *Garner*, 346 U.S. at 490-91. It is only left for us to ask: How, *in fact*, can state law "regulate" an activity "within the central aim of federal regulation"?

In *Garmon* this Court turned its attention, we believe properly, to the nature of the activities regulated, rather than the method of regulation adopted, as the prime factor in resolving preemption problems. Yet it would be a disservice to the *Garmon* principle to allow its abstract validity to blind us to the reality earlier recognized by this Court in *Garner*: "* * * when two separate *remedies* are brought to bear on the *same activity*, a conflict is imminent." 346 U.S. at 498-99. (Emphasis added.) State law could regulate labor relations, in potential conflict with the federal scheme, if it could provide a separate remedy by awarding back pay and punitive damages to an employee who brings an action grounded on job discrimination aimed at encouraging or discouraging union adherence. As the dissenters in *Gonzales* so correctly insisted, there is in effect not the least bit less regulation of labor relations, and not the least bit less potential conflict with the federal scheme, when state law provides a separate remedy by awarding back pay and punitive damages or damages for "mental suffering" to an employee who suffers job discrimination aimed at encouraging union adherence, merely because the employee grounds his action on the loss of union membership rights. See 356 U.S. at 623-33 (dissenting opinion); *cf. Russell*, 356 U.S. at 647-59 (dissenting opinion).

In short, state law could regulate conduct "within the central aim" of national labor policy if it could provide remedies when such conduct is made the subject matter of a state court action; and state law can continue effectively to regulate conduct "within the central aim" of national labor policy as long as this Court allows a state court to provide remedies for such conduct on the theory it is providing "consequential damages" for other conduct of a merely peripheral concern to the federal scheme. To paraphrase *Garmon*, a remedy is more than a means of regu-

lation; a remedy is regulation. The fact that state remedies, such as punitive damages, will often be far more devastating in their impact on a labor organization than the remedies available through the NLRB only serves to emphasize the way a state can employ its remedial powers to effectuate its own notions of substantive labor relations policies under the guise of enforcing nonfederal rights. As the Chief Justice said in his *Russell* dissent: "The Federal Act represents an attempt to balance the competing interests of employee, union and management. By providing additional remedies the States may upset that balance as effectively as by frustrating or duplicating existing ones." 356 U.S. at 650.

The *Garmon* rule, then, should be refashioned somewhat as follows: When an activity is arguably subject to section 7 or section 8 of the federal Act, a court must defer to the exclusive competence of the NLRB to regulate such activity, except as necessary to maintain public order, not only by refusing to entertain an action based on that activity but also by refusing to provide a remedy for it even where it is related to some other conduct which is within the court's jurisdiction and which is the subject of the action.[18]

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[18] We have phrased our statement of the rule in keeping with the *Garmon* wording. It might well be, however, that the issue of federal preemption should not pivot solely on the narrow question of whether a particular activity is either protected or prohibited by the National Labor Relations Act. The majority opinion in *Garmon*, see 359 U.S. at 245, may foreshadow an acceptance by this Court of a broader preemption doctrine along the lines advocated by such scholars as former Professor Cox. For him the NLRA is a "comprehensive code of regulation" in the field of labor-management relations, effecting a "total pre-emption of state laws dealing with unionization and collective bargaining, including resort to peaceful strikes and picketing." Cox, "The Labor Decisions of the Supreme Court at the October Term 1957," *Proceedings of the ABA Section*

So stated, the principle gives full weight to the best that has been taught by the decisions from *Garner* through *Garmon*; disposes of the disharmonies of *Gonzales* and *Russell*; and leaves intact state jurisdiction to remedy violence and other conduct not central to the federal scheme. If on occasion there might be some difficulty in deciding whether a state court had in fact taken preempted conduct into account in fashioning a remedy for conduct subject to state control,[19] any such difficulty would be more than offset by the increased protection afforded national labor policy. The suggested change in the preemption rule would of course not vary the capacity of the federal and state courts to entertain suits to enforce contracts between unions and employers as a matter of federal law under section 301 of Taft-Hartley.[20]

We respectfully urge the Court to use this opportunity to reexamine *Gonzales* and *Russell*, to repudiate their dangerous rationales, and to base the decisions in the present cases on reasoning like that we have proposed.

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of Labor Relations Law 12, 20-21 (1958); see also "Report of the Committee on State Labor Legislation," *Proceedings of the ABA Section of Labor Relations Law* 133, 136 (1959). This Court has stated that preemption is not affected by any distinction between state laws regulating labor-management relations as such and state laws of general applicability. *Weber* v. *Anheuser-Busch*, 348 U.S. 468, 479-480. *Cf. Teamsters Local 24* v. *Oliver*, 358 U.S. 283.

[19] The dissenters in *Russell* acknowledged that a state court could award damages for "physical injuries inflicted in the course of conduct regulated under the Federal Act," but not for "economic loss sustained from conduct regulated by the Federal Act." 356 U.S. at 649, 650. In certain situations a precise dollar line between the one kind of damages and the other might be hard to draw. But it would seem no harder than determining whether any given jury verdict is "excessive."

[20] See note 3 *supra*.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the briefs for the petitioners, the judgments below in No. 482 and No. 541 should be reversed.

Respectfully submitted,

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